1997

State of Utah v. John D. Hawkins : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

v.

JOHN D. HAWKINS,

Defendant and Appellant.

Appellate Court No. 970398-CA

Priority 2

BRIEF OF APPELLANT

On Appeal from Decision of the Third District
Court of Salt Lake County, State of Utah,
Honorable Homer F. Wilkinson Presiding

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III. STATEMENT OF JURISDICTION

This Court has jurisdiction under Rules 3 and 4, Utah Rules of Appellate Procedure, and Utah Code Ann. § 78-2a-3(2)(e).

IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Under Utah's burglary statute, can an individual who has both a lease of real property and the sublessor's invitation to enter the property commit an unlawful entry or remaining when neither the lease nor the invitation is revoked? This issue was preserved at Tr. Vol. 2, at 54-60 (Motion for Directed Verdict); R. at 172-73 (Defendant's Motion to Arrest Judgment); R. at 223-24 (Rule 24 Motion for New Trial).

B. Is evidence that one entered a property in the same manner he had lawfully done dozens of previous times sufficient to show the person had the specific intent to unlawfully enter or remain and commit a crime within the premises? This issue was preserved at Tr. Vol. 2, at 54-60 (Motion for Directed Verdict); R. at 172-73 (Defendant's Motion to Arrest Judgment); R. at 223-24 (Rule 24 Motion for New Trial).

V. STANDARD OF REVIEW

In a criminal case, the State must produce evidence to show, beyond a reasonable doubt, the defendant committed the crime charged. Utah Code Ann. § 76-1-501(1). If the State fails

to produce sufficient evidence as to any one or more of the necessary elements of the charged offense, the Court must reverse a jury's verdict of guilt. State v. Becker, 803 P.2d 1290, 1293 (Utah App. 1990). Furthermore, legal questions, such as the meaning of "licensed" or "privileged" under the burglary statute, or whether the fact of commission of a crime is sufficient to infer "intent" under the burglary statute, are reviewed for correctness. Corbett v. Seamans, 904 P.2d 229, 1232 (Utah App. 1995). Similarly, whether the plaintiff has established a prima facie case is also reviewed for correctness.

In reviewing the evidence presented at trial the Court must view all facts, as well as all reasonable inferences derived therefrom, in the light most favorable to sustaining the verdict. State v. James, 819 P.2d 781, 784 (Utah 1991). In such a case, the role of the reviewing court is to neither judge the credibility of witnesses nor review the case as finders of fact. State v. Goddard, 871 P.2d 540, 543 (Utah 1994). Rather, review is limited to the question of whether there is sufficient evidence, including all reasonable inferences, from which each element of the offense can be shown beyond a reasonable doubt. State v. Gardner, 789 P.2d 273, 285 (Utah 1989). "[O]nly when the evidence is so lacking and insubstantial that a reasonable

person could not have reached that verdict beyond a reasonable doubt" will a jury's verdict be overturned. State v. Isaacson, 704 P.2d 555, 557 (Utah 1985).

VI. CITATIONS TO DETERMINATIVE STATUTES

Utah Code Ann. § 76-6-201 (definitions).

For the purposes of this part:

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(3) A person "enters or remains unlawfully" in or upon premises when the premises or any portion thereof at the time of the entry or remaining are not open to the public and when the actor is not licensed or privileged to enter or remain on the premises or such portions thereof.

Utah Code Ann. § 76-6-202 Burglary

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

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Utah Code Ann. § 76-2-103

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

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VII. STATEMENT OF FACTS

A. Nature of the Case and Course of Proceedings Below.

Defendant seeks review of the Trial Court's denial of Defendant's motions for Directed Verdict, to Arrest Judgment, and for a New Trial. R. at 284-292. Mr. Hawkins was convicted on or about June 26, 1996 of burglary, a third-degree felony, and theft, a Class A misdemeanor. Mr. Hawkins, through his prior cousnel, made timely Motions for Directed Verdict and to Arrest Judgment and through current counsel moved for New Trial. Tr., Vol. 2 at 54-60; R. at 172-73, 223-24. The trial court denied these motions. R. at 284-92. Mr. Hawkins filed a timely Notice of Appeal. R. at 293.

B. Statement of Facts.

The State charged that on or about January 13, 1996, Mr. Hawkins committed a burglary of a garage/storage unit located at 4195 South 500 West, #99 ("unit 99"), Salt Lake City, Utah. R. at 120 (Amended Information). Unit 99 is located in a light industrial complex containing 100 similar units. Tr., Vol. 1, at 194-95. Gordon Construction owned the complex and rented the units to individuals for use as mechanics shops, automobile painting booths and storage areas. Tr., Vol. 1, at 64, 195.

Gloria Markham leased adjoining units 98 and 99 from Gordon Construction. Tr., Vol. 1, at 64. Units 98 and 99 were connected by an interior door which had no lock. Tr., Vol. 1, at 148. Gloria Markham leased those units in partnership with her brother Tim Markham. Tr., Vol. 1, at 68, 85. Even though Gloria Markham was the actual lessee of units 98 and 99, Tim Markham was the one who worked in the units and paid the rent to Gordon Construction. Tr., Vol. 1, at 68, 85, 88-89.

Gloria Markham regularly allowed Tim Markham to sublet or permit others to use units 98 and 99. Tr., Vol. 1, at 70, 135-36. The general arrangement Tim Markham had with people he allowed to use the units was, "you pay you stay. If you don't, you go." Tr., Vol. 1, at 136, 145.

During the summer of 1995, Tim Markham entered into a sublease agreement for unit 98 with Mr. Hawkins. Tr., Vol. 1, at 136, 138, 140, 67, 71. Mr. Hawkins rented the space in order to perform auto-body work and painting. Tr., Vol. 1, at 136-38. Tim Markham had the same arrangement with Mr. Hawkins he had with others he permitted to use and enter the units -- "you pay, you stay. If you don't you go."[1] Tr., Vol. 1, at 136, 169. As

[1]Initially, Mr. Hawkins paid Mr. Markham on a per-car basis. Tr., Vol. 1, at 136-38. That agreement was later modified to a month-to-month arrangement. Tr., Vol. 1, at 169.

rent, Mr. Hawkins paid Mr. Markham one-half of what Mr. Markham paid to lease both units. Tr., Vol. 1, at 169. The combined rent for both shops was $680. Id. Thus, Mr. Markham required Mr. Hawkins to pay a monthly rent of $340.00. Tr., Vol. 1, at 169. Mr. Hawkins usually paid his half of the rent on the units directly to Mark Gordon. Tr., Vol. 1, at 170.

Although Mr. Hawkins rented the spaces so he could perform auto-body repair and painting, he lacked the necessary tools for that type of work. Tim Markham testified that tools such as impact wrenches, pulleys, welders, grinders and spray guns were essential to auto-body repair work. Tr., Vol. 1, at 152 (referring to State's Exhibit 3). When Mr. Hawkins began working in the units, the only tools he brought were a sander and an air file, which he borrowed from a third person. Tr., Vol. 1, at 136. Thereafter, the only additional tools Mr. Hawkins acquired were a couple of metal boxes containing sockets, ratchets and screwdrivers, and an air blower. Tr., Vol. 1, at 172; State's Exhibit 4. Therefore, Tim Markham allowed Mr. Hawkins to use Mr. Markham's tools so Mr. Hawkins could perform auto body work. Tr., Vol. 1, at 159, 171. Tim Markham kept most of his tools in Unit 99. Tr., Vol. 1, at 117, 150. Accordingly, Mr. Hawkins frequently worked and was seen working in both units

98 and 99. Tr., Vol. 2, at 10, 33. Indeed, Jim Severns, another tenant in the complex, understood Mr. Hawkins and Mr. Markham were sharing units 98 and 99. Tr., Vol. 2, at 34.

In addition to the few tools Mr. Hawkins had, he kept several of his personal items in unit 99 including a microwave oven, dragster brakes, curio cabinet glass doors and a dragster. Tr., Vol. 1, at 140, 157, 172-73; Tr., Vol. 2, at 99.

Mr. Hawkins frequently worked in the units when Mr. Markham was not there. Tr., Vol. 1, at 138. Mr. Hawkins did not keep a regular schedule of when he worked or would work in the units. Tr., Vol. 1, at 138. Tim Markham testified he knew of at least four times when Mr. Hawkins worked in the shop during the middle of the night and, on occasion, would work there through the night. Tr., Vol. 1, at 138. Jim Severns also testified that it was not unusual to see Mr. Hawkins work in units 98 and 99 all night long. Tr., Vol. 2, at 34. There is nothing in the record showing Mr. Markham objected to this practice.

Each unit in the complex has two access points: a side door and a roll-up garage door. Tr., Vol. 1, at 101, 195. The Markhams had given Mr. Hawkins a key to the side door. Tim Markham testified that on the occasions Mr. Hawkins did not have his key with him, he accessed the units by rolling under the

roll-up garage door of the unit. Tr., Vol. 1, at 138. The garage door of unit 98 was missing a couple of rollers and, therefore, could not be locked as designed. Tr., Vol. 1, at 101, 147. In order to secure the door one would have to "take vice grips to clamp the door shut so you couldn't raise it up." Tr., Vol. 1, at 147-48. Mr. Hawkins told Mr. Markham he knew how to, and in fact would, circumvent the vice-grip lock in order to access the units when he forgot his key to the unit. Tr., Vol. 1, at 138. Nothing in the record indicates that Mr. Markham objected to this method of access by Mr. Hawkins. And, nothing in the record establishes that prior to January 13, 1996, Mr. Markham sought from Mr. Hawkins return of the key.

Mr. Hawkins was current with the rent through November 1995.[2] Tim Markham testified that in October Mr. Hawkins paid him $290.00 for rent. Tr., Vol. 1, at 190. This amount represented the amount of rent Mr. Hawkins owed to date. Tr., Vol. 1, at 189. Mark Gordon later testified that Mr. Hawkins paid rent for the month of November 1995. Tr., Vol. 1, at 213-14; Defendant's Exhibit 14.

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[2] During cross-examination, Mr. Markham conceded that if Mr. Hawkins was in fact current with the rent through November, "he should have come down . . . ." Tr., Vol. 1, at 171.

Although Mr. Hawkins' rent was current through November 1995, he seemed to "disappear" near the end of October 1995. Tr., Vol. 1, at 108, 139; Tr., Vol. 2, at 10. The record shows, however, he did not remove any of his belongings from units 98 and 99. Tr., Vol. 1, at 108; Tr., Vol. 2, at 17; State's Exhibit 4.

There is nothing in the record indicating that after October 1995 the Markhams ever told Mr. Hawkins not to come to the units or told Mr. Hawkins he was no longer welcome. Moreover, on cross-examination, both Gloria Markham and Tim Markham conceded they never evicted Mr. Hawkins from the units. Tr., Vol. 1, at 113, 170.

While the State's evidence lacks any mention that the Markhams told Mr. Hawkins he was no longer welcome in the units, it is replete with evidence that after October 1995, Gloria Markham, Tim Markham and Jim Severns repeatedly urged and invited Mr. Hawkins to come to the units. Tr., Vol. 1, at 108-09, 141-42; Tr., Vol. 2, at 19-20. Gloria Markham testified that Jim Severns, Tim and Lisa "all the time" would call the business where John worked to ask John to retrieve his property. Tr., Vol. 1, at 108-09. Tim Markham testified, "[John] was called three or four or ten or twenty times, and we told him to move the

car . . . we told him to come get his dragster." Tr., Vol. 1, at 141. Tim Markham personally told Mr. Hawkins to "[c]ome get your stuff." Tr., Vol. 1, at 142. Jim Severns spoke with John three or four times and told John the landlord and Mr. Markham wanted Mr. Hawkins to come to the units to remove his belongings. Tr., Vol. 2, at 19-20.

Unit 99 was allegedly burgled at approximately 4:00 a.m. on January 13, 1996. At that time Jim Severns was in his unit and heard two cars running in the complex. Tr., Vol 2, at 11, 14-15. Concerned with a rash of thefts that had occurred in the area, Mr. Severns investigated. Tr., Vol. 2, at 11. When Mr. Severns walked outside he saw "two cars parked there, and the drivers were talking to each other." Tr., Vol. 2, at 11. At that point one car headed west and the other pulled up in front of Mr. Severns' unit. Tr., Vol. 2, at 11. The latter car was driven by Mr. Hawkins. Tr., Vol. 2, at 11. Mr. Hawkins asked Mr. Severns what he was doing there, and Mr. Severns asked the same of Mr. Hawkins. Tr., Vol. 2, at 11. During that conversation Mr. Hawkins "seemed nervous." Tr., Vol. 2, at 52. When asked what he was doing there, Mr. Hawkins stated he was looking for his dog. Tr., Vol. 2, at 12. Shortly thereafter, Mr. Hawkins' dalmatian ran around the corner and jumped into the

car Mr. Hawkins was driving. Tr., Vol. 2, at 12. Mr. Hawkins then drove off. Tr., Vol. 2, at 12.

Mr. Severns spoke with Mr. Hawkins two other times that morning. The next conversation occurred at approximately 4:12 a.m. Tr., Vol. 2, at 13-14. During that conversation Mr. Hawkins told Mr. Severns he had driven by the shop and had seen that the door was open. Tr., Vol. 2, at 14. Mr. Hawkins called back a few minutes later and asked Mr. Severns to get all of Mr. Hawkins' belongings out of the units for him. Tr., Vol. 2, at 14. After the second call Mr. Severns went back to sleep. Tr., Vol. 2, at 15.

Mr. Severns woke up around 6:30 a.m. Tr., Vol. 2, at 15. Mr. Severns then left his unit and walked to the other end of the yard as he usually did each morning. Tr., Vol. 2, at 15. When Mr. Severns walked by unit 98 he noticed the bottom of the roll-up garage door had been kicked in. Tr., Vol. 2, at 15. Mr. Severns contacted Gloria and Tim Markham concerning what had occurred. Tr., Vol. 2, at 16. Gloria Markham, Tim Markham and Jim Severns inspected the units and discovered several items were missing including items belonging to Mr. Hawkins and items belong to Mr. Markham. Tr., Vol. 2, at 16; State's Exhibits, 3 & 4. They also noticed puppy footprints on the furniture. Tr., Vol.

1, at 126; Tr., Vol. 2, at 18. None of the missing items has been recovered.

Based on the foregoing evidence, the jury found Mr. Hawkins guilty of burglary. R. at 168.

VIII. SUMMARY OF THE ARGUMENTS

A. The State Failed to Offer Sufficient Evidence to Prove an Unlawful Entry or Remaining.

Mr. Hawkins could not have committed an unlawful entry because he had the express permission of the leaseholders to enter and remain on the property. Prior to the alleged burglary, the Markhams gave Mr. Hawkins two express grants of authority to enter the units. First, in the summer of 1995, the Markhams entered into a lease agreement with Mr. Hawkins in connection with the use of the units and knew Mr. Hawkins regularly entered both units. The lease agreement, "license" and "privilege" were never revoked and Mr. Hawkins was never evicted. Second, beginning in November 1995, the Markhams repeatedly urged and invited Mr. Hawkins to return to the units to remove his belongings.

These two specific grants of authority by the Markhams vested in Mr. Hawkins the lawful right, or license, to enter and remain in the units. Accordingly, no unlawful entry or remaining could have occurred.

B. The State Failed to Offer Sufficient Evidence to Show Mr. Hawkins Entered or Remained in Unit 99 with the Specific Intent to Commit a Felony, Theft or Assault on Any Person.

At trial, the State failed to offer any evidence to show Mr. Hawkins possessed a specific criminal intent to commit a theft when he entered or remained in unit 99. The State offered no evidence to show Mr. Hawkins entered unit 99 with any purpose in mind other than to remove his belongings.

IX. ARGUMENT

In order to support a burglary conviction, the State must establish two elements. State v. Sisneros, 631 P.2d 856 (Utah 1981); State v. Brooks, 631 P.2d 878 (Utah 1981). The State must show first that the accused entered or remained unlawfully, and second, that the accused did so with the intent to commit a theft. Id. In this case, the State failed to introduce sufficient evidence to establish either prong.

A. Mr. Hawkins Did Not Commit an Unlawful Entry Because He Entered the Property in Question with the Permission of the Property Possessors.

Utah's burglary statute specifically requires that the State prove, beyond a reasonable doubt, the accused committed an unlawful entry or remaining. Utah Code Ann. § 76-6-202(1). In order to show an unlawful entry or remaining, the State must prove the accused entered or remained on the premises without

license or privilege. Utah Code Ann. § 76-6-201(3). If the State fails to make that showing or, as in this case, offers in its case-in-chief unrefuted evidence showing the accused entered or remained on the property with the permission of the property holder, the burglary conviction must be vacated. See State v. Harper, 785 P.2d 1341 (Kan. 1990) (interpreting a similar statute). Thus, a burglary conviction cannot stand where the undisputed evidence shows the accused received the express and unrestricted permission to enter the property in question and that permission was not thereafter revoked.

1. Unlawful Entry Requires an Entry That Is Made Without the Authority of the Property Holder.

The first element of the crime of burglary may be established by showing the accused committed an unlawful entry. Utah Code Ann. § 76-6-202(1). However, this element was not designed to make criminals out of those who enter with the alleged victim's permission. Historically, "the law was not ready to punish one who had been invited in any way to enter the dwelling. The law sought only to keep out intruders, thus anyone given authority to come into the house could not be committing a breaking when he so entered." W. LaFave and A. Scott, Handbook on Criminal Law § 96, p. 708.

Modern burglary statutes, such as Utah's, which require an unlawful entry, are generally interpreted as retaining this aspect of the common law. State v. Thibeault, 402 A.2d 445 (1979). In Thibeault, the Maine Supreme Court explained:

> In other jurisdictions, . . . the word "breaking" has been eliminated and a word or phrase such as "unlawful," "unauthorized" or "without license or privilege" has been inserted in the statute to qualify "entry." Where such language has been employed in a burglary statute, the result has generally been to retain so much of the breaking elements as required a trespassory entry while at the same time eliminating the illogical rules stemming from the "force" aspect of breaking. *Of course, where the stature requires a trespassory entry, the lawful possessor's consent is a complete defense.*

Id. (emphasis supplied).

Utah has retained the common law element that a trespass is necessary to satisfy the first element of the offense. As such, and in addition to the plain language of the statute, consent of the possessor remains a complete defense.

State v. Harper, 785 P.2d 1341 (Kan. 1990) was decided under very similar facts and interprets a nearly identical statute. There, the Kansas Supreme Court reversed a burglary conviction where the defendant had permission to enter the building at issue. Id. at 1349. The alleged victim in Harper, "Dukes," owned a softball complex. Id. at 1342. Dukes hired Harper to construct a garage on the complex. Thereafter, Dukes

hired Harper as head groundskeeper for the complex for the 1986 season. Dukes gave Harper a key to the complex so Harper could carry out his duties as groundskeeper. Dukes did not restrict Harper's access to the complex and, in fact, gave Harper permission to stay in the building overnight "to take care of business or if he was too intoxicated to drive." Id.

When the garage was not completed by the end of the 1986 season, Dukes asked Harper to return the keys. Harper told Dukes he needed the keys to retrieve his belongings. Dukes did not press the issue and let Harper keep the keys. At no time thereafter did Dukes tell Harper he could not enter the building or stay overnight. Furthermore, there was no indication Harper continued to work for Dukes after Dukes requested return of the keys. Id.

In April 1987, at approximately 2:00 a.m., presumably some four or five months after the end of the softball season, Harper entered the complex using the key Dukes had provided him. Once inside, Harper broke into a filing cabinet and removed files belonging to Dukes. Id. at 1343. Defendant was subsequently charged and convicted of burglary. Id.

The Kansas Supreme Court reversed the conviction, holding that the State failed to satisfy the element of unlawful entry. The Court reasoned:

> Dukes' testimony established that he gave defendant a key and allowed him, in essence, full access to the building at all hours, including the authority to stay overnight. Although Dukes apparently asked for the keys back, he did not receive them and was aware that defendant still retained the keys. Furthermore, Dukes did not restrict defendant's ability to have access to the building by placing any specific limitation upon the access given through the possession of a key. The State's suggestion, by its leading question, and the finding by the Court of Appeals that defendant did not have permission to be in the building at 2:00 a.m. was [sic] contradicted in the answer given by Dukes.[3] Defendant did have authority to be in the building at 2:00 a.m.

Id. at 1345.

If a burglary statute requires an unlawful entry which is defined as an entry made without license or privilege, an unlawful entry cannot occur where the accused was given permission to

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[3] "'Q [by prosecutor]: Well, did he have permission to be in there at two in the morning?

A [by Dukes]: That particular night, no.

Q: Had he before that?

A: I do recall making the statement the year before that if he needed to get in and take care of business or, you know he got - he got where he couldn't drive home because he was intoxicated or something, that he could stay on my couch. I will admit that. But he didn't have my permission to be there; at that time . . . .'"

enter unless and until that permission is withdrawn prior to entry. People v. Barefield, 804 P.2d 1342, 1345 (Colo. App. 1990) (citing People v. Carstensen, 420 P.2d 820 (Colo. 1966)).

2. Mr. Hawkins Could Not Have Committed an Unlawful Entry Because He Entered the Property with the Permission of the Leaseholders.

The State's case in chief clearly demonstrated that Mr. Hawkins entered unit 99 with the Markhams' permission, license and privilege. Indeed, the Markhams gave Mr. Hawkins two express grants of authority to enter, either of which was sufficient to allow him to enter the unit lawfully. The first grant of authority was the un-revoked lease agreement the Markhams entered into with Mr. Hawkins. The second grant of authority came by means of the repeated invitations the Markhams extended Mr. Hawkins to remove his belongings from both units 98 and 99.

a. The lease agreement Mr. Hawkins had with the Markhams vested in him the lawful right to enter unit 99 and Mr. Markham Ratified Mr. Hawkins' Open and Notorious Entry of Unit 99.

Mr. Hawkins did not commit an unlawful entry because he had a valid lease agreement that was never terminated. In the summer of 1995, Mr. Hawkins entered into a lease with the Markhams. Tr., Vol. 1, at 136, 138, 140, 67, 71. Mr. Markham testified that the initial lease was for unit 98. Tr., Vol. 1, at 169. However, the record reveals one of two necessary

conclusions. First, the scope of the lease extended to both units 98 and 99. According to Mr. Markham, the monthly rent was calculated at one-half the monthly rental for *both* units. Id. Units 98 and 99 were connected by an interior door which had no lock. Tr., Vol. 1, at 148. It was known anyone with access to unit 98 had access to unit 99. Furthermore, Mr. Markham gave Mr. Hawkins permission to use tools which were located in unit 99 and thus license to enter unit 99. Tr., Vol. 1, at 159, 171. Mr. Hawkins also kept his belongings there and his work in both units was open and notorious. Tr., Vol. 1, at 140, 157, 172-73; Tr., Vol. 2, at 10, 33. Finally, according to Mr. Severns, it appeared as if Mr. Hawkins was leasing both units. Tr., Vol. 2, at 34.

Second, regardless of whether the initial lease agreement went to both units, or whether the conduct of the parties modified the lease agreement to reach both units, the record is clear that Mr. Hawkins had full, unrestricted access to both units 98 and 99. Mr. Markham invited Mr. Hawkins' entry into unit 99 by offering the use of his tools, and ratified Mr. Hawkins' entry into unit 99 by never objecting to Mr. Hawkins' repeated, open and notorious entries into the unit. Thus, whether the lease extended to both units or Mr. Hawkins was merely licensed to

enter unit 99, the record establishes Mr. Hawkins had both the license and privilege to enter unit 99 without restriction.

Mr. Hawkins' right to access unit 99 was never terminated or revoked. Both Markhams conceded on cross-examination that they never evicted Mr. Hawkins from either unit. Tr., Vol. 1, at 113, 170. Furthermore, there is nothing in the record to indicate either Tim or Gloria Markham ever told Mr. Hawkins he was no longer welcome. Indeed, there is no evidence even to this day the Markhams have sought the return of the key they provided Mr. Hawkins to access the units.

These facts were materially identical to the facts in Harper. In both cases, the alleged victim testified he gave the accused, in essence, full access to the building at all hours, including the authority to stay overnight. Neither victim restricted defendant's ability to enter the building by placing any specific limitations on access. The only evidence suggesting the accused lacked authority to enter the property on the night in question was an improper question concerning whether the alleged victim gave the accused permission to enter on the night in question which was contradicted by the victim's own

testimony;[4] questions which, in effect, elicited legal conclusions.

Mr. Markham's legal conclusion and his unexpressed feeling that he did not want Mr. Hawkins to enter were irrelevant and inconsistent with his own testimony. First, after Mr. Markham testified he entered into a lease with Mr. Hawkins, the State had the burden to show the lease was terminated or Mr. Hawkins was evicted. There was no such showing.

Second, Mr. Markham's claim that Mr. Hawkins did not have his permission to be in the units on the night in question does not follow. Mr. Markham leased the units to Mr. Hawkins and repeatedly ratified Mr. Hawkins' entry into unit 99. In addition, on numerous occasions Mr. Markham invited, and in fact urged, Mr. Hawkins to return to the units to remove his belongings. Neither of those two grants of authority was ever rescinded. Indeed, the state objected when Mr. Hawkins, while testifying, produced the key to access the units. Tr., Vol. 2, at 169.

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[4] "Q. (Prosecutor) 'Did [Mr. Hawkins] have your permission to be in either unit 99 or 98 on January the 13th?

A. (Mr. Markham) No, absolutely not.'" Tr., Vol. 1, at 149.

See supra, footnote 3, which quotes the similar exchange in Harper.

The law does not permit a property possessor to invite another to enter his property, and then, months after the fact, claim to revoke that permission when he does not like the result. If Mr. Markham did not want Mr. Hawkins to return to the units, he was required to make that known. He did not do so.

The Markhams granted Mr. Hawkins the license and privilege to enter both units 98 and 99. They never revoked that license by terminating the lease, evicting Mr. Hawkins or informing him he was no longer welcome. Therefore, as a matter of law, Mr. Hawkins could not have committed an unlawful entry.

b. The Markhams granted Mr. Hawkins license and privilege to enter unit 99 when they repeatedly asked Mr. Hawkins to return to remove his belongings.

In addition to the license granted Mr. Hawkins via the lease agreement and Mr. Markham's invitation and ratification of Mr. Hawkins' open and notorious entry into unit 99, the Markhams' repeated invitations that he return to the units to remove his belongings also vested in Mr. Hawkins a lawful right to enter unit 99. Mr. Hawkins left a number of personal possessions in the units. Tr., Vol. 1, at 108, 139; Tr., Vol.2, at 17; State's Exhibit 4.[5] According to the Markhams, they wanted those items

[5]Indeed, the Markhams testified they charged him for storing his property in the Units [Defendant's Ex. 6], which evinces an

removed. Gloria Markham testified that Jim Severns, Tim and Lisa had called Mr. Hawkins' work "all the time" and told him to come get his property. Tr., Vol. 1, at 108-09. Tim Markham testified that he and others called Mr. Hawkins as many as twenty times and told him to remove his belongings. Tr., Vol. 1, at 141. Finally, Jim Severns testified he personally told Mr. Hawkins that Mr. Gordon and Mr. Markham *wanted* Mr. Hawkins to come back to the units to pick up his property. Tr., Vol. 2, at 19-20.

Pursuant to the Markhams' repeated requests, Mr. Hawkins returned to the units and removed his belongings. Even if Mr. Hawkins took property from unit 99 that did not belong to him, he would be a thief, but not a burglar. Jackson v. State, 259 So.2d 739, 744 (Fla. App. 1972) (Justice McNulty, concurring).

The Markhams entered into a lease agreement with Mr. Hawkins granting him complete and unrestricted access to units 98 and 99. That lease was never terminated either by act or implication. Thereafter, the Markhams extended an open invitation to Mr. Hawkins to return to the units to remove his

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additional indicia of his license and privilege to enter. If two people are sharing a storage unit and each has a key, they each have license to enter. The removal by one person of more property than he owns does not make him a burglar.

belongings. The Markhams placed no restrictions on Mr. Hawkins concerning when he could return to the units or whether someone else must be present when he did so. These two express grants of authority vested in Mr. Hawkins both the license and privilege to enter unit 99. Therefore, Mr. Hawkins could not have committed an unlawful entry.

B. Mr. Hawkins Did Not Commit an Unlawful Remaining Because His Permission to Enter the Premises Was Not Revoked.

Mr. Hawkins entered unit 99 pursuant to two specific grants of authority from the Markhams. See Argument, (A), *supra*. That permission was never revoked. Therefore, Mr. Hawkins could not have committed an unlawful remaining.

1. Unlawful Remaining Requires a Presence in or on a Property Which Continues After Authority to Enter Is Revoked.

If there is no unlawful entry, the State must show an unlawful remaining in order to sustain a burglary charge. Utah Code Ann. § 76-6-201(3). Unlawful remaining applies "where the defendant's initial entry is authorized, but at some later time that person's presence becomes unauthorized." State v. Bradley, 752 P.2d 874, 876 (Utah 1985) (citing State v. Brown, 630 P.2d 731 (Kan. 1981)). Thus, in order for an unlawful remaining to occur, the initial authority to enter must be revoked.

The revocation necessary to trigger an unlawful remaining may be made by implication or affirmative act. Speaking to the former, the Court in Brown noted, "one who enters a department store during business hours and secretes himself or herself in a public washroom until the store is closed, remains without authority . . ." Brown, 630 P.2d at 735 (citing Vernon's Kansas Crim. C. § 21-3715 (1971)). Interpreting a similar statute and citing the same hypothetical, the Alabama Supreme Court reasoned an unlawful remaining occurs in such a case because, "such a person remains . . . knowing that his license or privilege to remain extends only until the time of closing." Ex Parte Gentry v. State, 689 So.2d 916, 919 (Ala. 1996). Thus, by implication, license to remain in a building terminates once the building closes to the public.

A license or privilege to remain in or on a property may also be expressly revoked. For example, if the property holder who is present tells the accused to leave the property or that he is no longer welcome, the accused's license or privilege to remain therein expires, provided the accused is not otherwise entitled to be there, such as by lease.

However, "[t]he mere fact that a crime was committed or was intended is an insufficient basis for finding that the entry

or remaining was without license or privilege." People v. Hutchinson, 124 Misc. 2d 487, 490, 477 N.Y.S.2d 965, 967 (Sup. Ct 1984), *aff'd*, 121 A.2d 849, 503 N.Y.S.2d 702 (1986), *appeal dismissed*, 68 N.Y.2d 770, 506 N.Y.S.2d 1054, 498 N.E.2d 156 (1986); People v. Crowell, 470 N.Y.S.2d 306 (1983). The Hutchinson court explained that finding that the commission of a crime constitutes an unlawful remaining would "impermissibly [broaden] the scope of liability for burglary, making a burglary of anyone who commits a crime on someone else's premises." Id. Indeed, as the drafters of the Model Penal Code noted, taken to its extreme, such an interpretation would lead to the even more absurd result of making a burglar out of one who entered his own home to prepare a fraudulent tax return or assault his wife. Model Penal Code and Commentaries, Part II § 221.1, p. 64-65 (1980).

Similar reasoning was used in People v. Crowell, 470 N.Y.S.2d 306 (1983), where the court granted Crowell's motion to dismiss a burglary indictment because he had been granted permission to enter the victim's home and that permission was never revoked. Id. at 307-08. There, the alleged victim hired Crowell to paint his home. Id. at 307. The homeowner gave Crowell a key to the home and allowed him access to store

painting supplies and to paint an interior ceiling. While inside, Crowell stole some of the homeowner's property. Id. at 308. Crowell was indicted for burglary. The court dismissed the indictment, reasoning as follows:

> In this case, the defendant clearly was licensed or privileged to be in the victim's building. Neither the victim here nor any owner would ever intend that his permission to enter or remain would extend to accommodate a thief. However, the privilege to be within the premises is not negated by the formulation of criminal intent, or even the undertaking of criminal actions therein. . . . Upon reflection, it will be seen that not terminating one's license or privilege upon his commission of criminal conduct makes both practical and theoretical sense. A rule to the contrary would mean that an intoxicated guest who loses his temper and intentionally smashes a vase becomes a burglar. Innumerable like examples can be imagined. Such was not the intent of the legislature in creating the burglary statute, all of which have trespassorial conduct as one essential element. *Clearly, to constitute a burglary, this conduct must exist separately from and independently of the criminal intent.*

Id. (emphasis supplied).

Thus, if the accused enters the property under the authority of license or privilege, the possessor must revoke that authority before an unlawful remaining can occur. Without the necessary revocation, a burglary cannot occur regardless of what the license holder's intent may be.

2. Mr. Hawkins Did Not Commit an Unlawful Remaining Because His Permission to Enter the Property Was Never Revoked.

The State failed to offer any evidence that Mr. Hawkins' lawful right to remain in unit 99 was ever revoked. As such, an unlawful remaining did not occur. Once the State demonstrated Mr. Hawkins had a lawful right to enter unit 99, it had the burden to show Mr. Hawkins' presence became unauthorized. State v. Bradley, 752 P.2d 874, 876 (Utah 1985). Here, there was no such showing. Accordingly, the State failed to satisfy the essential element of an unlawful remaining.

Nothing in the record shows Mr. Hawkins' license or privilege to enter unit 99 was either implicitly or expressly revoked. First, Mr. Hawkins' license to remain was not implicitly revoked. An implicit revocation occurs, for example, when the actor enters a property and thereafter hides in or on the property knowing his authority to remain will terminate at some point. Such was not the case here. Mr. Hawkins returned to the units in the early morning hours as had been his practice. Accordingly, there was no implicit revocation.

Second, Mr. Hawkins' authority to remain was not explicitly revoked. Explicit revocation occurs when the property possessor expressly communicates to the actor that he is no

longer welcome. That did not happen in this case. Here, the property possessors, Gloria and Tim Markham, were not present when Mr. Hawkins complied with their continuous requests that he remove his belongings. Accordingly, the Markhams did not, and indeed could not, expressly revoke Mr. Hawkins' license to remain in unit 99.

The testimony of the so-called victims in this case established that they expressly and repeatedly vested in Mr. Hawkins the lawful right to enter both units 98 and 99. They never thereafter revoked that license or privilege. Therefore, as a matter of law, Mr. Hawkins could not have committed an unlawful remaining.

C. The State Failed to Offer Sufficient Evidence to Show Mr. Hawkins Possessed the Criminal Intent Necessary to Support a Burglary Conviction.

In addition to establishing an unlawful entry or remaining, the State was required to prove criminal intent. Utah Code Ann. § 76-6-202(1). An act is committed with intent when it is the actor's conscious objective or desire to engage in the conduct or cause the result. Utah Code Ann. § 76-2-103(1).

Evidence of burglarious intent is rarely, if ever, susceptible of direct proof. State v. Porter, 705 P.2d 1174, 1177 (Utah 1985). "It is usually inferred from circumstantial

evidence: the manner of entry, the time of day, the character and contents of the building, the person's actions after the entry, the totality of the circumstances, and the intruder's explanation." Id. In light of these criteria, the act of entry, alone, is insufficient to prove intent. State v. Johnson, 771 P.2d 1071, 1072-72 (Utah 1989).

The majority of the modern Utah Supreme Court cases addressing the element of criminal intent under the burglary statute have two common themes. State v. Porter, 705 P.2d 1174 (Utah 1985); State v. Johnson, 771 P.2d 1071 (Utah 1989); State v. Pitts, 728 P.2d 113 (Utah 1986); State v. Isaacson, 704 P.2d 555 (Utah 1985); State v. Wilson, 701 P.2d 1058 (Utah 1985); State v. Sisneros, 631 P.2d 856 (Utah 1981); State v. Brooks, 631 P.2d 878 (Utah 1981). First, the initial entry was unauthorized, and second, the entry occurred under unusual or suspicious circumstances. In Brooks, for example, Brooks pried off a screen at approximately 11:00 p.m. in order to gain access to a stranger's apartment. Brooks stayed in the apartment for approximately 15 minutes. While inside, he turned off three or four switches on a power panel. In Johnson, the defendant entered a stranger's locked apartment. Once inside Johnson partially shut the door, wandered around the apartment and opened a jewelry box owned by

the victim. Based on the Porter criteria, the facts that the initial entries were made without permission and the unusual circumstances surrounding the entries, the courts found there was sufficient evidence to support the inference of criminal intent.

The totality of the circumstances here reveals a lack of evidence concerning any criminal intent on the part of Mr. Hawkins. Reasonable minds could not infer a criminal intent based upon the manner of entry, the time of day, the character and contents of the building, Mr. Hawkins' actions after entry, or his explanation of why he was at the unit on the night in question. Indeed, the totality of the circumstances in this case evinces an occurrence which was expected and commonplace with respect to the parties.

First, there was nothing suspicious or unusual concerning the manner in which Mr. Hawkins entered the units. Mr. Hawkins presumably gained access to the units by rolling under the broken roll-up garage door. Mr. Markham testified he knew Mr. Hawkins often would access the units in that fashion when he forgot his key. Tr., Vol. 1, at 138. There is nothing in the record to suggest Mr. Markham objected to this method of access by Mr. Hawkins. No inference of criminal intent can be drawn from the manner of entry because Mr. Hawkins regularly accessed the

units by rolling under the garage door with the knowledge and consent of Mr. Markham.

Second, no inference of a culpable mental state can be drawn from the time of day Mr. Hawkins entered the units. According to Messrs. Markham and Severns, Mr. Hawkins frequently worked in the units in the early morning hours and, at times, would spend the entire night there. Tr., Vol. 1, at 138; Tr., Vol. 2, at 34. Mr. Markham was aware of this fact and did not object. Although working at four o'clock in the morning may not be common for most people, it was typical for Mr. Hawkins. Accordingly, no inference of criminal intent can be drawn from the time of day Mr. Hawkins entered the units.

Finally, no inference of criminal intent can be drawn from Mr. Hawkins' actions after entry or his explanation concerning his presence on or near the property. Mr. Severns saw Mr. Hawkins shortly after 4:00 a.m. on the morning of the theft. Mr. Severns asked Mr. Hawkins what he was doing there. Tr., Vol. 2, at 11. Mr. Hawkins responded he was looking for his dog. Mr. Hawkins' dog then ran around the corner and jumped into Mr. Hawkins' car. Mr. Hawkins then left the area. Id.

There is also no logical connection between the criminal intent one must have upon entering the property and what occurred

here after the alleged theft. Criminal intent cannot be inferred from the fact that the accused presents himself to and speaks with a person who places him at the scene immediately *after* the crime was committed. Indeed, speaking with Mr. Severns, rather than avoiding him, appears exculpatory rather than as evidence of criminal intent. Furthermore, Mr. Hawkins' response to Mr. Severns' inquiry is not suspicious. Mr. Hawkins said he was looking for his dog, which he was.

Even if Mr. Hawkins' later conduct in talking to Mr. Severns could somehow be construed as evidence of a *prior* culpable mental state, those facts must be viewed in light of the totality of the circumstances. More specifically, what wrong-doing, if any, was Mr. Hawkins trying to cover up by talking with Mr. Severns? Assuming Mr. Hawkins committed a theft while inside the units, his subsequent conduct would have been to evade responsibility for the theft, not that he had unlawfully entered or remained. Therefore, the fact that Mr. Hawkins was less candid with Mr. Severns when asked what he was doing there was not indicative of a guilty mind with respect to a burglary. Under the totality of the circumstances, the evidence of this case reflects a regular and common occurrence between the

parties, rather than evidence which is indicative of a culpable mental state.

X. CONCLUSION

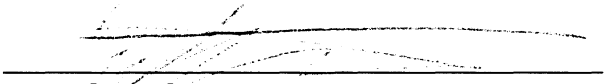
For the foregoing reasons, Appellant respectfully requests the Court to reverse the verdict of guilty of the burglary charge.

XI. REQUEST FOR ORAL ARGUMENT

Defendant requests oral argument because of the novelty of the issues presented under Utah law.

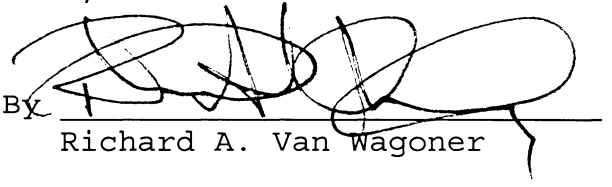
DATED this 16th day of December, 1997.

Attorneys for Appellant



Edward R. Montgomery

SNOW, CHRISTENSEN & MARTINEAU



By _____
Richard A. Van Wagoner

XII. ADDENDUM

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(801)359-2368
Counsel for Defendant

**IN THE THIRD DISTRICT COURT OF
THE COUNTY OF SALT LAKE, DIVISION I, STATE OF UTAH**

STATE OF UTAH, Plaintiff, v. JOHN D. HAWKINS, Defendant.	**ORDER DENYING DEFENDANT'S RULE 23 MOTION TO ARREST OF JUDGMENT** Trial Court No. 961900499FS Judge: Wilkinson

This matter came before the Court pursuant to the Defendant's Rule 23 Motion To Arrest Judgment. Upon review of Defendant's motion and the court record, the Court Finds:

1. There was sufficient evidence presented to sustain the jury's verdict of guilt with respect to the burglary charge; and

2. There was sufficient evidence presented to sustain the jury's verdict of theft.

Accordingly, the Court DENIES Defendant's Motion to Arrest Judgment.

DATED May 21, 1997

The Honorable Homer Wilkinson

Prepared and presented by:

Edward R. Montgomery
Attorney for Defendant

Approved as to form and content:

y Castle
Deputy District Attorney
Attorney for Plaintiff.

Certificate of Mailing

I certify that on May 23, 1997, I served copies of the above Order by placing copies of the same in the United States Mail postage prepaid and addressed as follows:

E. Neal Gunnarson, District Attorney for Salt Lake County
Cy H. Castle, Deputy District Attorney
2001 S. State # F 3700
Salt Lake City, Utah 84190-1210

DATED May 23, 1997

Edward R. Montgomery
Attorney for Defendant

Edward R. Montgomery
Utah Bar No. 7583
136 South Main, Suite 404
Salt Lake City, Utah 84101
(801)359-2368
Counsel for Defendant

IN THE THIRD DISTRICT COURT OF
THE COUNTY OF SALT LAKE, DIVISION I, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. JOHN D. HAWKINS, Defendant.	**ORDER DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT** Trial Court No. 961900499FS Judge: Wilkinson

This matter came before the Court pursuant to the Defendant's Motion for a Directed Verdict. Having heard the evidence presented and listened to the argument by counsel, the Court finds:

1. The State presented sufficient evidence to support a prima facie case of burglary; and

2. The State presented sufficient evidence to support a prima facie case of theft.

Accordingly, the Court DENIES Defendant's Motion for a Directed Verdict.

DATED May 21, 1997

The Honorable Homer Wilkinson

287

Prepared and presented by:

Edward R. Montgomery
Attorney for Defendant

Approved as to form and content:

Cy Castle
Deputy District Attorney
Attorney for Plaintiff.

Certificate of Mailing

I certify that on May 23, 1997, I served copies of the above Order by placing copies of the same in the United States Mail postage prepaid and addressed as follows:

E. Neal Gunnarson, District Attorney for Salt Lake County
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2001 S. State # F 3700
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DATED May 23, 1997

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Attorney for Defendant

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Salt Lake City, Utah 84101
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Counsel for Defendant

**IN THE THIRD DISTRICT COURT OF
THE COUNTY OF SALT LAKE, DIVISION I, STATE OF UTAH**

STATE OF UTAH, Plaintiff, v. JOHN D. HAWKINS, Defendant.	**ORDER DENYING DEFENDANT'S RULE 24 MOTION FOR A NEW TRIAL** Trial Court No. 961900499FS Judge: Wilkinson

This matter came before the Court pursuant to the Defendant's Rule 24 Motion for a New Trial. Upon review of Defendant's motion and the court record, the Court Finds:

1. There was sufficient evidence presented to sustain the jury's verdict of guilt with respect to the burglary charge; and

2. The jury was properly instructed with respect to the legal elements necessary to support a charge of burglary.

Accordingly, the Court DENIES Defendant's Rule 24 Motion for a New Trial.

DATED this 21 Day of May, 1997

The Honorable Homer Wilkinson

Prepared and presented by:

Edward R. Montgomery
Attorney for Defendant

Approved as to form and content:

Cy Castle
Deputy District Attorney
Attorney for Plaintiff.

Certificate of Mailing

I certify that on May 23, 1997, I served copies of the above Order by placing copies of the same in the United States Mail postage prepaid and addressed as follows:

E. Neal Gunnarson, District Attorney for Salt Lake County
Cy H. Castle, Deputy District Attorney
2001 S. State # F 3700
Salt Lake City, Utah 84190-1210

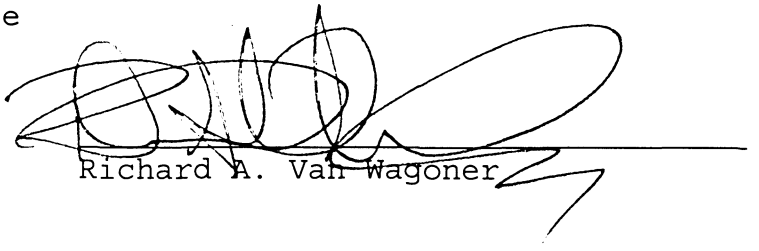
DATED May 23, 1997

Edward R. Montgomery
Attorney for Defendant

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 16th day of December, 1997, I caused two (2) copies of the foregoing Brief of Appellant to be served by first-class mail upon the following party:

Christine Soltis
Assistant Attorney General
160 East 300 South, Suite 600
Salt Lake City, Utah 84114
Counsel for Appellee



Richard A. Van Wagoner

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